1   KEKER & VAN NEST LLP
    ROBERT A. VAN NEST - # 84065
2   rvannest@kvn.com
    CHRISTA M. ANDERSON - # 184325
3   canderson@kvn.com
    DANIEL PURCELL - # 191424
4   dpurcell@kvn.com
    633 Battery Street
5   San Francisco, CA 94111-1809
    Telephone: (415) 391-5400
6   Facsimile: (415) 397-7188

7   KING & SPALDING LLP
    BRUCE W. BABER (pro hac vice)
8   bbaber@kslaw.com
    1185 Avenue of the Americas
9   New York, NY 10036
    Telephone: (212) 556-2100
10 Facsimile: (212) 556-2222

11 Attorneys for Defendant
    GOOGLE INC.

12   UNITED STATES DISTRICT COURT

13   NORTHERN DISTRICT OF CALIFORNIA

14   SAN FRANCISCO DIVISION

15

16 ORACLE AMERICA, INC.,   Case No. 3:10-cv-03561 WHA (DMR)

            Plaintiffs,

17   **GOOGLE'S NOTICE OF MOTION AND**
        v.   **MOTION TO REDACT AND SEAL**
18   **PORTIONS OF THE JANUARY 14, 2016**
    GOOGLE INC.,   **DISCOVERY HEARING TRANSCRIPT**
19
            Defendant.   Date: February 25, 2016
20   Time: 11:00 a.m.
                                           Dept.   Courtroom 4, 3rd Floor (Oakland)
21   Judge: Hon. Donna M. Ryu

22

23

24

25

26

27

28

GOOGLE'S NOTICE OF MOTION AND MOTION TO REDACT AND SEAL PORTIONS
OF THE JANUARY 14, 2016 DISCOVERY HEARING TRANSCRIPT
Case No. 3:10-cv-03561 WHA (DMR)

1021292

NOTICE OF MOTION

PLEASE TAKE NOTICE that on February 25, 2016, at 11:00 a.m., or as soon thereafter

as the matter may be heard before the Honorable Donna M. Ryu, 1301 Clay Street, Oakland,

California, Courtroom 4, 3rd Floor, defendant Google, Inc. ("Google") will and hereby does

move this Court, pursuant to the Northern District of California's Civil Local Rule 7-2 and

General Order 59, paragraph 4, for an order redacting and sealing portions of the transcript from

the January 14, 2016 hearing held before the Court.[1] This Motion is based on this Notice and the

below Memorandum of Points and Authorities filed herewith, any reply memoranda that may be

filed, the argument of counsel, the case record, and any documentary evidence that may be

presented at the time of the hearing.

RELIEF REQUESTED

Google seeks an order redacting two specific portions of the transcript from the January

14, 2016 hearing, on the grounds that plaintiff Oracle America, Inc. ("Oracle") improperly

revealed during that hearing sensitive, non-public financial information regarding revenues and

profits relating to Android. The relevant portions of the hearing transcript appear at the following

locations:

· Page 4, lines 10-13
· Page 6, lines 19-20

---

[1] The transcript for the January 14, 2016 hearing formerly was docketed as Docket Entry No. 1437, but the entry has since been removed from the public docket.

1

1021292

1

MEMORANDUM OF POINTS AND AUTHORITIES

2

INTRODUCTION

3   Pursuant to the Northern District of California's Civil Local Rule 7-2 and General Order

4 59 Google hereby brings this motion to redact and seal Google-confidential financial information

5 that Oracle improperly disclosed at the January 14 hearing in violation of the Protective Order

6 governing this case. Specifically, Oracle improperly disclosed sensitive non-public financial

7 information regarding revenues and profits relating to Android. Importantly, while the Court has

8 not yet had an opportunity to rule on the instant motion to redact and seal this information, the

9 Court has previously held that "good cause" exists to seal this same or very similar information,

10 and the Court has granted Google's past requests to keep this information under seal. Google

11 respectfully requests that the Court seal this sensitive information, as it has done in the past. [2]

12

BACKGROUND

13   At the January 14, 2016 hearing on Oracle's Motion to Compel [Dkt. No. 1404], Oracle's

14 counsel improperly disclosed highly sensitive, confidential information regarding revenues and

15 profits relating to Android, which were derived from internal Google financial documents

16 designated "HIGHLY CONFIDENTIAL – ATTORNEY'S EYES ONLY" under the Protective

17 Order. *Id.* at 4:10-13, 6:19-20. Although the Protective Order requires that "parties shall give

18 the other parties notice if they reasonably expect a deposition, hearing or other proceeding to

19 include Protected Material," [Dkt. No. 66 ¶ 5.2(b)], Oracle provided no notice to Google that it

20 intended to disclose this information at the January 14 hearing. Declaration of Maya Karwande

21 ("Karwande Decl.") at ¶ 2.

22

---

23 [2] Google also seeks to redact and seal another portion of the January 14, 2016 transcript that
discloses highly confidential information related to an agreement between Google and non-party
24 Apple Inc. Google orally moved to seal that information at the hearing, immediately after
Oracle's counsel improperly disclosed it, but the Court denied that oral motion. Dkt. No. 1434.
25 On January 20, 2016, Google filed a motion combining its instant request to seal Google-specific
financial information, with a related request to move for leave to file a motion for reconsideration
26 of the Court's order denying Google's oral motion to seal the Apple-related information. The
Clerk's Office advised Google that it should file two separate motions. Accordingly, Google
27 submits this notice of motion and motion to seal the Google-specific information, and is
submitting a separate motion for leave to file a motion for reconsideration of the Court's order
28 denying Google's oral request to seal the Apple information.

2

1021292

1   Google wrote to Oracle's counsel objecting to Oracle's improper disclosure and asking

2   Oracle to join in Google's written motion to seal Google's confidential financial information.

3   Karwande Decl. at ¶ 4. Oracle never responded to that request. *Id.*

4   Oracle's intentional failure to respect the agreed upon protocols mandated by the

5   Protective Order—*i.e.*, giving advance notice of an intention to disclose confidential material in a

6   public hearing—has resulted in precisely the harm that the Protective Order is intended to

7   prevent.   Specifically, Oracle's improper disclosure has resulted in confidential information

8   being leaked to the press, with confidential financial information relating to Android serving as

9   the headline in Internet press reports.[3] *See, e.g.*, http://www.bloomberg.com/news/articles/2016-

10   01-21/google-s-android-generates-31-billion-revenue-oracle-says-ijor8hvt;

11   http://www.theverge.com/2016/1/21/10810834/android-generated-31-billion-revenue-google-

12   oracle. Google files this motion to limit the potential impact of Oracle's misconduct.

DISCUSSION

14   Where, as here, a party seeks to redact and/or seal confidential information in connection

15   with a non-dispositive *discovery* motion, a "'good cause' showing under Rule 26(c) will suffice"

16   to protect the information. *Kamakana v. City & Cnty. of Honolulu*, 447 F.3d 1172, 1180 (9th

17   Cir. 2006) (distinguishing between the "good-cause" standard for sealing information submitted

18   in connection with a discovery dispute from the "compelling reason" standard applicable to

19   sealing information submitted in connection with pretrial or trial proceedings); *see also* Fed. R.

20   Civ. P. 26(c) (stating that if "good cause" is shown in discovery, a district court may issue any

21   order which justice requires "to protect a party or person from annoyance, embarrassment,

22   oppression, or undue burden or expense"). In this case, good cause exists for sealing Google's

23   highly confidential financial information.

24   Google does not publicly allocate revenues or profits to Android separate and apart from

25   Google's general business. Karwande Decl. at ¶ 3. That non-public financial data is highly

26   sensitive, and public disclosure could have significant negative effects on Google's business. *Id.*

27

28

[3] Google reserves all rights to seek sanctions and other relief as a result of Oracle's improper disclosure of confidential information.

3

1021292

1   Importantly, this Court has already recognized that non-public information about

2   Google's Android-related revenues and profits should be sealed. Less than two months ago,

3   Oracle quoted such information in a joint letter brief submitted to the Court under seal [Dkt. No.

4   1387]. Oracle filed an accompanying motion to seal [Dkt. No. 1386], Google submitted a

5   declaration explaining why the information warranted sealing [Dkt. No. 1388], and the Court

6   found that "[g]ood cause exists" to seal the information. Dkt. No. 1394 at 3. The Court's order

7   sealing non-public financial information was correct, and is consistent with Judge Alsup's orders

8   granting several other requests to seal similar types of financial information. *See, e.g.*, Dkt. Nos.

9   935, Dkt. No. 1056, Dkt. No. 1122, Dkt. No. 1375.

10   Google has worked diligently to bring this matter to the Court's attention before the

11   January 14, 2016 transcript becomes publicly available. *See* N.D. Cal. Civ. L.R. 7-9(b) (noting

12   that a party seeking leave to file a motion or reasonable consideration must exercise reasonable

13   diligence). Had Oracle provided Google with notice of its intent to disclose such confidential

14   information—as the Protective Order requires and as has been the parties' past practice in this

15   case—Google could have addressed this issue before the hearing. But, due to Oracle's failure to

16   provide the notice required under the Protective Order, Google has been forced to take

17   immediate steps to limit the potential harmful impact of that disclosure by filing this motion.

18   Google should not be punished for Oracle's intentional misconduct.

19   In view of the Court's past orders sealing the same or similar information, and the

20   sensitive, non-public nature of this financial information, Google respectfully requests that the

21   non-public financial information in the following portions of the January 14 hearing transcript be

22   redacted and sealed: page 4, lines 10-13; page 6, lines 19-20.

23   ### CONCLUSION

24   The information that Google seeks to redact and seal in this motion is narrowly tailored

25   to six specific lines from the January 14, 2016 hearing transcript. Public access to this highly

26   sensitive and confidential information would unnecessarily harm Google for the reasons stated

27   above, and would have little or no benefit to the public, particularly given that the information

28   relates to a non-dispositive discovery motion, and not to a public trial. Accordingly, for the

4

1021292

1   foregoing reasons, Google respectfully requests that the Court redact and seal page 4, lines 10-13

2   and page 6, lines 19-20 of the January 14, 2016 transcript.

3   Dated: January 21, 2016   KEKER & VAN NEST LLP

4   By: */s/ Robert Van Nest*
5   ROBERT VAN NEST

6   Attorneys for Defendant
                                                                 GOOGLE INC.

7

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

26

27

28

GOOGLE'S NOTICE OF MOTION AND MOTION TO REDACT PORTIONS
OF THE JANUARY 14, 2016 DISCOVERY HEARING TRANSCRIPT
Case No. 3:10-cv-03561 WHA (DMR)

1021292